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No. _____

In the Supreme Court of the United States

BRYAN E. SPILMON, *ET AL.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Paul D. Refior ("Rafe")
Counsel of Record
REFIOR LAW OFFICE
347 N. Buffalo St.
Warsaw, IN 46580
574-269-6649

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QUESTIONS PRESENTED FOR REVIEW

This court has reserved judgment on some critical questions relating to procedures for presentence motions to withdraw guilty pleas under Rule 11 of the Federal Rules of Criminal Procedure. Defendants face differing protections and differing results depending on which circuit is involved because the circuits have developed differing and conflicting standards and answers to the following questions:

1. Whether a district court is required to conduct a more detailed Rule 11 examination when the plea agreement involves a third person to explore whether the nature of a "package deal" plea agreement impairs the voluntariness of the plea.

2. What factors should be uniformly considered by district courts in determining whether a defendant has shown a fair and just reason for withdrawing his guilty plea?

3. Whether it is error for the Seventh Circuit to have *de facto* abrogated the intention and meaning of Rule 11 (d)(2)(B) by establishing a *per se* rule that the Rule 11 colloquy under oath is uniformly invulnerable to subsequent challenge regardless of voluntariness of the plea or evidence of innocence.

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the United States Court of Appeals for the Seventh Circuit.

The Petitioners here and Appellants below are Bryan E. Spilmon, Advanced Dental Consulting, Inc., and Mobile Dental Services of Indiana, Inc.

The Respondent here and Appellee below is the United States of America.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioners state as follows:

Petitioner Advanced Dental Consulting, Inc. has no parent or publicly held company owning 10% or more of its stock.

Petitioner Mobile Dental Services of Indiana, Inc. has no parent or publicly held company owning 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Bryan E. Spilmon, Advanced Dental Consulting, Inc., and Mobile Dental Services of Indiana, Inc. (hereinafter referred to collectively as "Spilmon"), respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 454 F.3d 657 (7th Cir. 2006), and is reprinted in the appendix to the petition (App. 1a-7a). The district court's opinion is unpublished and is reprinted as Appendix B (App. 8a-12a). The district court's final order denying Spilmon's motion to withdraw guilty plea is unpublished and is reprinted as Appendix C (App. 13a).

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on July 19, 2006. This Court has jurisdiction under 28 U.S.C. §1254(1).

RULE PROVISIONS INVOLVED

This case involves the interpretation and application of Rule 11 of the Federal Rules of Criminal Procedure (attached as Appendix D, App. 14a-18a) entitled "Rule 11. Pleas," which provides, in relevant part, as follows:

> "**11(b)(2).** ***Ensuring That a Plea Is Voluntary.*** Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary and

did not result from force, threats, or promises (other than promises in a plea agreement).

****

11(d)(2)(B). Withdrawing a Guilty or Nolo Contendere Plea. A defendant may withdraw a plea of guilty or nolo contendere:

****

(2) after the court accepts the plea, but before it imposes sentence if:

****

(B) the defendant can show a fair and just reason for requesting the withdrawal."

STATEMENT OF THE CASE

This case relates to the summary denial of Spilmon's presentence motion to withdraw guilty pleas which was in turn affirmed by the Seventh Circuit Court of Appeals. On February 23, 2005, petitioners changed their pleas to guilty. On April 18, 2005 Spilmon's current attorney entered his appearance and gave written notice to the court and to the prosecutor of Spilmon's intention to file a motion to withdraw guilty pleas. On May 5, 2005 the Spilmon motion to withdraw plea of guilty was filed, supported by eleven affidavits (eventually fifteen affidavits by ten different affiants) and hundreds of pages of exhibits. This was before the presentence report was completed. Spilmon's supplemental motion to withdraw plea of guilty, supported by numerous additional exhibits, was filed on May 20, 2005. The district court sent notice that all pending motions of Spilmon would be heard on the afternoon of June 16, 2005. The court clarified in a subsequent notice that at the hearing the court "will attempt to deal with the various problems that are presented without limitation."

On June 15, 2005 the court entered yet another notice as to all defendants stating, "This court is now in a position to give this case consideration for two additional half days beginning at 1:30 p.m. on June 20 and 21, 2005 in South Bend. This is in addition to the time allotted on June 16, 2005."

Spilmon expected and prepared for an evidentiary hearing because the court had set aside one and one-half days to hear Spilmon's motion to withdraw guilty pleas and related motions. At the beginning of the June 16, 2005 hearing the court asked Spilmon's attorney what was contemplated in the evidentiary hearing and Spilmon's attorney answered that procedural question. Then the trial court said, "All right. That's all I need from you right this minute." Spilmon's attorney informed the court that he did anticipate calling some witnesses.

Then the court heard from the prosecutor who proceeded to present his legal argument rather than answer the pending procedural question. Next, without taking any evidence, without permitting Spilmon's attorney any argument on Spilmon's motions, and without permitting Spilmon's attorney to respond to the prosecutor's arguments, the district court abruptly ended the proceedings by stating (Transcript, p.9),

> "I will rule in writing promptly, but not today. My ruling will be that on the basis of Seventh Circuit law, there is no basis for permitting Bryan E. Spilmon to withdraw his plea of guilty. I will set the case for sentencing as to him, at least, at some point in the not too distant future." (Emphasis added.)

The attorney for Spilmon interjected (Transcript, p.11),

> "May it please the court? I just want to comment that with all respect, Your Honor, my understanding, when you asked me to go to the podium, was to answer a procedural question about what I expected - and you

have already announced your ruling, so it's a bit moot - but I will state that I am mystified that it has moved in this direction. There was not oral argument."

The court responded, "Well you got whatever you have. It's not been my intention to treat anyone unfairly. Quite to the contrary. Defendants' bond is continued." That was the end of the so-called hearing on Spilmon's motions.

In its June 20, 2005 memorandum opinion and order (App. 8a-12a) the district court denied Spilmon's motion to withdraw guilty plea. Said memorandum stated, "This court now takes full judicial notice of the entire record in this case." The court mentioned that there had been "an extremely wide array of filings on behalf of the defendant Bryan E. Spilmon" ... "The parties and counsel had been given a full opportunity to spread of record a wide array of contentions and counter-contentions." The district court repeatedly stated that it did not have the discretion to consider Spilmon's affidavits and evidence of innocence, e.g. "the unquestioned law in this circuit"; "the clear mandates of law in this circuit"; "These decisions seriously inhibit the withdrawal of a plea when the plea proceedings have been under oath"; and "the case law in this circuit does not require this court to wade through the elaborate allegations that this defendant has attempted to place before it." (Emphasis added.)

The court set the case for sentencing. Spilmon's motion for reconsideration of the motion to withdraw guilty pleas was also denied. Thus the trial court summarily denied out of hand Spilmon's presentence motion to withdraw guilty plea that had been substantiated with credible evidence of Spilmon's innocence, without either permitting the withdrawal of Spilmon's guilty plea, conducting an evidentiary hearing, or even providing an explanation as to why the evidence was insufficient or incredible.

Although the district court did not permit an evidentiary hearing or even oral argument, Spilmon had filed with the court fifteen affidavits totaling over 100 pages, and had filed hundreds of pages of exhibits, to support Spilmon's motion and to demonstrate Spilmon's innocence. Those were the items of which the district court had specifically stated it had taken judicial notice. It is extremely noteworthy in this case that the government chose not to file any counter-affidavits or even to deny the matters set forth in the affidavits and exhibits that had been filed by Spilmon.[1]

The following is a more detailed summary of Spilmon's uncontroverted sworn affidavits and exhibits which were a part of the record at the time the district court summarily denied Spilmon's motion to withdraw guilty plea:

The government had seized all of Spilmon's computers and documents. Spilmon is a dentist, but his wife is not. When Spilmon attempted to explain his innocence to his former defense attorney and to assert that the seized documents would substantiate Spilmon's innocence, said attorney refused to listen. Even though said former attorney did not have the background or ability to determine the meaning and effect of the seized documents, the former attorney refused to allow Spilmon to touch, study, or even explain any of such documents during a time when a part of the seized documents were being reviewed under the constant supervision of representatives of the prosecutor. The former attorney did not even obtain copies of any of the documents until after the plea negotiations were underway, and even then the former attorney never informed Spilmon that he had obtained any copies of any of the documents and none of such documents were ever shown to or delivered to Spilmon by said former attorney.

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[1] The government did submit Exhibits 1 and 2, but they were nothing more than an attorney's billing and a printer's invoice.

Spilmon repeatedly asserted to his former attorney that Spilmon, his wife, and the corporate defendants were innocent and that proof of such innocence could be found in the seized documents. In response the former defense attorney repeatedly asserted to Spilmon that the prosecutor had threatened that the only way Spilmon could avoid his wife being sent to prison would be for Spilmon to plead guilty as a part of a package deal. That defense attorney further asserted to Spilmon that since the prosecutor had been able to previously put Spilmon and his wife in jail and keep them there for three weeks by making misrepresentations to the court, Spilmon should expect that the prosecutor could once again send Dr. Spilmon and his wife to prison regardless of their innocence.

When Spilmon's former attorney presented to him a written plea agreement, Spilmon told his lawyer directly that the allegations in the plea agreement were false and if Spilmon were to sign the plea agreement it would be a lie. In response the lawyer repeated that the prosecutor had guaranteed that unless Spilmon would sign the plea agreement which called for Spilmon to plead guilty and Spilmon's wife's charges to be dismissed, then Spilmon's wife would definitely go to prison. When Spilmon continued to protest that the statements in the plea agreement were false, the former attorney instructed Spilmon that he should just "intellectualize" the statements and sign the plea agreement anyway. Spilmon signed the plea agreement against his will. In preparation for the change of plea hearing, Spilmon's former lawyer instructed Spilmon with scripted answers that the attorney said were necessary to protect Spilmon's wife from going to prison, even though she was innocent.

Spilmon's affidavits and exhibits in the record addressed each of the charges to which the guilty plea had been involuntarily made. Spilmon's evidence negated even the possibility of Spilmon's guilt. For example, Spilmon was

charged with fraudulently billing Medicaid for TMJ x-rays that allegedly had not been actually performed. The proof that the x-rays were in fact performed existed in the form of digital radiographs that were stored electronically on the computer that the government seized and possessed. The American Dental Association's Code of Dental Terminology or CDT gives the definition of what is medically necessary. Both of the x-rays used by Spilmon fit in the definition of medical necessity. Additionally, Spilmon's evidence filed with the court included a letter from Connie Pitner, the Indiana Medical Dental Field Consultant, who had not only reviewed Spilmon's treatments, billings, and documentations, but then she even personally approved the dental claims on Spilmon's behalf that included such TMJ x-rays, biopsies, and other procedures by submitting Spilmon's claims herself.

Similarly, Spilmon was charged with, and involuntarily pled guilty to, committing Medicaid fraud by charging for oral biopsies which allegedly had not been performed. Among the documents finally obtained and filed with the court were stacks of the very biopsy reports that proved irrefutably that said biopsy procedures had in fact been performed. Each biopsy report showed that Spilmon had submitted the specimen, giving the date, the name of the patient, the lesion site, and the results of the biopsy. Furthermore, said biopsy procedures were identified in the CDT and were shown to be medically necessary.

Spilmon also filed affidavits of five individuals who declared that prior to the change of plea hearing Dr. Spilmon had told them that both he and his wife were innocent, that Dr. Spilmon felt hopeless because his attorney was doing nothing to help him, and would not listen to him. Dr. Spilmon told them about the threat by the prosecutor that Dr. Spilmon's wife would go to prison unless Dr. Spilmon pled guilty as a part of the package deal - a threat that Dr. Spilmon considered credible since that same prosecutor had

succeeded in keeping Dr. Spilmon and his wife in jail for three weeks by making misrepresentations to the court. After the plea agreement the prosecutor admitted that they had nothing on Spilmon's wife. Again, the government did not deny any of these matters and did not file any counter-affidavits.

The plea agreement called for Spilmon to plead guilty to the more serious charges, with some other charges being dismissed, and for Spilmon's wife and some corporate defendants being dismissed. During the change of plea hearing, Spilmon's wife was present with counsel, but the district court did not ask her any questions. The district court did not ask any detailed examination as to the voluntariness of any defendants' guilty plea pursuant to the package deal. In fact, during the entire Rule 11 colloquy the following is all that was addressed concerning the linkage, with only one general question directed to Spilmon, and his response being exactly two words. Here are the two questions and answers (Change of Plea Transcript, pp. 20-22):

> "THE COURT: Now there are a number of agreements. One of the agreements has to do with the dismissal of other defendants in this case - including your wife, who is here - and the dismissal of other counts to which you have not pled guilty?
>
> THE DEFENDANT: Yes, sir.
>
> ****
>
> THE COURT: Other defendants, including Mrs. Spilmon, are going to be dismissed; is that correct?
>
> MR. SCHMID: That is correct, your Honor." [Mr. Schmid is the prosecutor.]

At the change of plea hearing Spilmon answered the judge's questions just as they had been scripted by his attorney, even though said answers were not true. Spilmon's former attorney warned Spilmon that during the change of plea hearing Spilmon should not make any additional

comments or answers that could possibly reveal or give away the fact that Spilmon and his wife were actually innocent.

The prosecutor then admitted to Spilmon's attorney that the prosecutor knew that Spilmon had actually performed the dental work and procedures relating to the very charges Spilmon had pled guilty to which alleged that Spilmon had not performed such services, and that the government actually had nothing against Spilmon's wife.

On appeal, the Seventh Circuit mostly addressed "package" plea agreements. App. 2a-5a. The Seventh Circuit noted that a number of cases state that such "package deals" require special scrutiny, citing cases from the Seventh, First, Tenth, and D.C. Circuits. App. 2a-3a. The Seventh Circuit did state that not all cases endorse a double standard whereby package deals receive stricter scrutiny than plea agreements. However, the Seventh Circuit did not pay but lip service to its own precedent in *United States v. Bennett*, 332 F.3d 1094, 1100 (7th Cir. 2003) which specifically called for a more detailed Rule 11 examination when the plea agreement involves a third person to explore whether the nature of a "package deal" plea agreement impairs the voluntariness of the plea. With the Seventh Circuit's opinion in this case, the new position of the Seventh Circuit now is that package deals must be viewed with caution by the judge but no more so than with all plea deals.

The Seventh Circuit opinion in the present case describes what it says could be coercive and would be a case of duress (App. 3a-4a). The Seventh Circuit's hypothetical actually is close to the actual Spilmon situation. But if that coerced hypothetical defendant had completed the sworn Rule 11 colloquy, he never would have a change to present the truth about the coercion or about his innocence. (See the "GOTCH-YA" rule at page 27 *infra*).

In the present case the Seventh Circuit, like the district court, totally disregarded the uncontroverted evidence of the

innocence of Spilmon and his wife. Furthermore, among the affidavits submitted to the court in support of Spilmon's motion to withdraw his guilty plea, Dr. Spilmon's attorney told him that the prosecution threatened that Spilmon's wife would be incarcerated if Dr. Spilmon did not accept the package plea deal even though the government had nothing against Mrs. Spilmon at that time. To repeat for emphasis, in this case the government chose not to deny the facts presented by Spilmon or to file any counter-affidavits.

REASONS FOR GRANTING THE PETITION

I. The Supreme Court has specifically reserved judgment on the constitutional implications of criminal plea agreements which involve third parties. The circuits are divided on the issue of whether a court is required to conduct a more detailed Rule 11 examination when the plea agreement involves a third person to explore whether the nature of a "packaged deal" plea agreement impairs the voluntariness of the plea.

A. The source of the knowing and voluntary requirement for guilty pleas is the United States Constitution, and voluntariness is a core concern of Rule 11.

In *McCarthy v. United States*, 394 U.S. 459, 465 (1969) this Court articulated the fundamental principles for a valid guilty plea. *McCarthy* held that a defendant's plea would be vacated if it were accepted by the district court "without fully adhering to the procedure provided for in Rule 11." *Id.* at 463-464. Subsequently this court has rejected a *per se* approach. In *Boykin v. Alabama*, 395 U.S. 238 (1969), a state case that did not relate to the Federal Rule 11, this Court did, however, affirm that the source of the knowing and

voluntary requirement for guilty pleas is the United States Constitution, not Rule 11. *Id.* at 243-44. See also *United States v. Benitez*, 542 U.S. 74 (2004). In footnote 10 of *Benitez* this court did identify that it is a constitutional question whether a defendant's guilty plea was knowing and voluntary. 542 U.S. at 84 n.10. It is fundamental that "a plea of guilty must be intelligent and voluntary to be valid." *Brady v. United States*, 397 U.S. 742, 747 n.4 (1970).

If the district court fails to conduct a full and direct voluntariness examination in open court, it compromises one of Rule 11's "core concerns" and undermines the validity of the guilty pleas. *United States v. Martinez-Molina*, 64 F.3d 719 (1st Cir. 1995), citing *United States v. Allard*, 926 F.2d 1237, 1244-45 in explaining that Rule 11's core concerns are (1) absence of coercion, (2) understanding of the charges, and (3) knowledge of the consequences of the guilty plea. See also *United States v. Abbott*, 241 F.3d 29, 33 (1st Cir. 2001).

Rule 11(b)(2) of the Federal Rules of Criminal Procedure directly provides that before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement). *Allard* cites *McCarthy v. U.S., supra*, for the proposition that due process requires that the plea amount to a voluntary and intentional relinquishment or abandonment of a known right or privilege. Certainly Congress and this Court intend for Rule 11 to be fully and properly implemented to ensure compliance with the specific dictates and provisions adopted, and adherence to said core concerns of Rule 11.

B. Most of the circuits have acknowledged that this Court has specifically reserved judgment on the constitutional implications of plea agreements which involve third parties.

It is significant that eight of the circuits have cited *Bordenkircher v. Hayes*, 434 U.S. 357, 365 n.8 (1978) to note that this Court has raised the issue, but reserved judgment on, the constitutional implications of plea agreements which involve third parties. See *United States v. Mescual-Cruz*, 387 F.3d 1, 7 (1st Cir. 2004); *United States v. Marquez*, 909 F.2d 738, 741 (2nd Cir. 1990), cert. denied, 498 U.S. 1084 (1991); *United States v. Hodge*, 412 F.3d 479, 489 (3rd Cir. 2005); *United States v. Morrow*, 914 F.2d 608, 613 (4th Cir. 1990); *United States v. Nuckols*, 606 F.2d 566, 570 (5th Cir. 1979); *United States v. Usher*, 703 F.2d 956, 958 (6th Cir. 1983); *Miles v. Dorsey*, 61 F.3d 1459, 1468 (10th Cir. 1995); and *United States v. Pollard*, 959 F.2d 1011, 1021 (D.C. Cir. 1992).

C. This Court and the various circuits have recognized that there are risks of inducing false guilty pleas by packaging pleas together.

The various circuits have joined this Court in recognizing that there are risks of inducing false guilty pleas by packaging pleas together. Circuits which recognize the risk of impairing the involuntariness of a plea when there is a "package deal" include the following:

First Circuit, *United States v. Ortiz-Torres*, 449 F.3d 61, 68 (1st Cir. 2006), "We have previously recognized that such package deals create a significant risk that one defendant will plead guilty against his will in order for his co-defendants to obtain the offered benefit. Second Circuit: *United States v. Marquez*, 909 F.2d 738, 742 (2nd Cir. 1990),

"A plea negotiation that includes a benefit to a third person can place pressure on a defendant in two respects. The defendant feels the weight of his own concern to have the benefit conferred and also endures the entreaty of the third person who is anxious to receive the benefit. ... in most cases, however, the extent of the pressure arising from the prospect of conferring a benefit on a third party will probably be most significantly affected, not by the way the offer arose, but by the extent of the benefit to be conferred and the relationship of the defendant to the third party."

Third Circuit: *United States v. Hodge*, 412 F.3d 479, 489 (3rd Cir. 2005), "We believe that determining voluntariness in package deal situations is an especially delicate matter." Fourth Circuit: *United States v. Morrow*, 914 F.2d 608, 613 (4th Cir. 1990), "Morrow is right that a plea bargain which involves leniency for a third person 'might pose a greater danger of inducing a false guilty plea by skewing the assessment of the risks a defendant must consider.'" Fifth Circuit: *United States v. Diaz*, 733 F.2d 371, 374-375 (5th Cir. 1984), "Since such circumstances [threatening prosecution of a thirty party family member] pose a possible greater danger of coercion, we held in *Nuckols* that prosecutors who choose to exercise such techniques would be held to a high standard of good faith." Sixth Circuit: *United States v. Usher*, 703 F.2d 956 (6th Cir. 1983), "*Hayes* and other cases indicate that guilty pleas made in consideration of lenient treatment in favor of third persons pose a greater danger of coercion than purely bilateral plea bargaining." Seventh Circuit: *United States v. Bennett*, 332 F.3d 1094, 1101 (7th Cir. 2003), "The possibility of coercion resulting from plea agreements linking multiple defendants together, or defendants and third persons together, argues for the adoption of this rule." Ninth Circuit: "[T]hey pose an additional risk of coercion not present when the defendant is

dealing with the government alone." *United States v. Caro*, 997 F.2d 657, 658-59 (9th Cir. 1993). Tenth Circuit: *United States v. Carr*, 80 F.3d 413, 416 (10th Cir. 1996), "We have recognized 'that threats to prosecute or promises of leniency to third persons to induce guilty pleas can pose a danger of coercion' and therefore requires special care 'to insure that the plea was in fact entered voluntarily and was not the product of coercion.'" Eleventh Circuit: *Stano v. Dugger*, 921 F.2d 1125, 1141 (11th Cir. 1991), "Because a guilty plea is equivalent to a conviction, the trial court's determination of voluntariness must consider that '[i]gnorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality.'"

With such widespread agreement with this Court (*Bordenkircher v. Hayes*, *supra*) that package deals involving a third person might pose a greater danger of inducing a false guilty plea by skewing the assessment of the risk a defendant must consider, it is respectfully urged that this Court should grant this petition in order to resolve the conflicts of the circuits regarding Rule 11 procedures for presentence motions to withdraw guilty pleas which involve third persons.

D. The First Circuit and the Third Circuit have adopted two safeguards for when there are package plea deals, namely, there must be disclosure of the package deal, and then the district court must ascertain the voluntariness of each defendant's plea in light of the package deal.

The First Circuit and the Third Circuit require a more detailed Rule 11 examination when the plea agreement involves a third person to explore whether the nature of a "package deal" plea agreement impairs the voluntariness of

the plea. Until the present case, the Seventh Circuit had also specifically held that, "Upon disclosure of a package deal, the district court should make a more detailed examination as to voluntariness of the defendant's guilty plea pursuant to the package deal." *United States v. Bennett*, 332 F.3d at 1101.

The "two safeguards" procedure was very recently reaffirmed by the First Circuit in *United States v. Ortez-Torres*, 449 F.3d 61, 68 (1st Cir. 2006), wherein the court stated,

> "We have previously recognized that such package deals create a significant risk that one defendant will plead guilty against his will in order for his co-defendants to obtain the offered benefit. *United States v. Abbott*, 241 F.3d 29, 34 (1st Cir. 2001) ; *United States v. Martinez-Molina*, 64 F.3d 719, 732-33 (1st Cir. 1995). Thus we have crafted two safeguards designed to minimize this risk of coercion. *United States v. Mescual-Cruz*, 387 F.3d 1, 8 (1st Cir. 2004, cert. denied, 543 U.S. 1175, 1176) (2005). (Citing *United States v. Martinez-Molina*, 64 F.3d at 732-33.) First, the prosecution should inform the district court that the defendant's guilty plea is part of a package deal. *Id.* Second, the district court should carefully ascertain the voluntariness of the defendant's plea during the Rule 11 colloquy, with an eye toward minimizing the risk of co-defendant coercion inherent in the package-deal context. *Id.*" (Emphasis added.)

In 2005 the Third Circuit specifically adopted the twofold requirements when there is a package deal plea agreement involving a third person. In *United States v. Hodge*, 412 F.3d 479, 489 (3rd Cir. 2005) the Third Circuit cited with approval First Circuit cases, including *United States v. Abbott*, *supra*, and described the position of the First Circuit as having "sound reasoning." 412 F.3d at 490. In *Hodge* the Third Circuit specifically and affirmatively adopted the two-step requirements. "Mindful of these considerations, other courts

of appeal widely require that (1) package plea deals be disclosed to the court *AND* (2) colloquies with package plea participants be conducted with special care. We agree, and adopt these requirements for district courts in this circuit considering packaged pleas." *Id.* at 489-90. (Emphasis added.)

The *Hodge* court continued by providing a discussion about the meaning of "special care."

> "What then in general terms is 'special care'? At the threshold, a district court notified of a package deal plea bargain should question counsel closely to ensure that the precise terms of the packaged plea deal are on the record. See Fed.R.Crim.P.11(b)(2), 11(c)(2). Once it is clear exactly how a defendant's plea benefits his confederate(s), it may be helpful to ask who first proposed the package deal, see *United States v. Politte*, 853, F.2d 924, 930-31 (7th Cir. 1988), how extensively defense counsel was involved in developing the deal, see *United States v. Usher*, 703 F.2d 956, 958 (6th Cir. 1983) and what benefit the defendant expects to gain from the deal. See *United States v. Buckley*, 847 F.2d 991, 995 (1st Cir. 1988). When asking whether a plea is a product of force, threats, or inducements and the like, a district court should take care not to ask only whether the prosecutor forced, threatened, or coerced the defendant, but whether anyone did so. *United States v. Martinez-Molina*, 64 F.3d 719, 734 (1st Cir. 1995). Having so inquired the court should be particularly attuned to even mild expressions of reluctance by a defendant. See *United States v. Farley*, 72 F.3d 158, 164 (D.C. Cir. 1995); *United States v. Daniels*, 821 F.2d 76, 79 (1st Cir. 1987). Such expressions always should trigger a more searching inquiry. See *Farley*, 72 F.3d at 164. On the other hand, as none of the defendants may be particularly eager to plead guilty, one defendant's expression of reluctance should be

compared to those of other defendants involved in the package deal. See *United States v. Morrow*, 914 F.2d 608, 613 (4th Cir. 1990).

"The foregoing is not a checklist that, if followed, automatically will prevent a Rule 11 colloquy from going awry. Rather it is a summary of lessons drawn from colloquies evaluated by other courts of appeals. The overarching rule is that a district court considering a package deal should be particularly attentive to a defendant's responses to voluntariness questions throughout a colloquy. That being said, district courts of course should remember the package deal plea bargains are not inherently coercive, and that the judge's goal is not to doom the deal but simply to ensure that the defendant's plea is voluntary." ...

"Nonetheless, when the government risks inducing false guilty pleas by packaging pleas together, *Bordenkircher*, 434 U.S. at 365 n.8, justice and prudence require that the district court be notified and pay special care." (Emphasis added.) *Id.* at 491-492.

E. The Fourth, Fifth, Sixth, Ninth, and D.C. Circuits require either special care or a more searching inquiry when there is a package deal.

The Fourth, Fifth, Sixth, Ninth, Tenth, and D.C. Circuits have not adopted a two-step process for determining the voluntariness of package deal pleas. Instead the decisions in said circuits state that special care must be taken or the court must undertake a more searching inquiry to determine the voluntariness of a plea in a package plea situation. These circuits are less insistent upon the second step, for example, see: Fourth Circuit: *United States v. Marrow*, 914 F.2d 608, 613-14 (4th Cir. 1990) ["Special care"]; Fifth Circuit: *United States v. Nuckols*, 606 F.2d 566, 570 (5th Cir. 1979) ["Special care must be taken to determine voluntariness where plea

agreement is 'made in consideration of lenient treatment as against third persons'"]; Sixth Circuit: *United States v. Usher*, 703 F.2d 956, 958 (6th Cir. 1983) ["Special care must be taken to ascertain the voluntariness of guilty pleas entered in such circumstances"]; Ninth Circuit: *United States v. Caro*, 997 F.2d 657, 658-59 (9th Cir. 1993) ["A more careful examination of voluntariness was required when the district court was faced with a package plea agreement"]; Tenth Circuit: *United States v. Carr*, 80 F.3d 413, 416 (10th Cir. 1996) ["Threats to prosecute or promises of leniency to third persons to induce guilty pleas can pose a danger of coercion and therefore require special care to insure that the plea was in fact entered voluntarily and was not a product of coercion"]; and D.C. Circuit: *United States v. Farley*, 72 F.3d 158, 164 (D.C. Cir. 1995) [requiring "more searching inquiry" at Rule 11 colloquy only if the defendant expresses reluctance when asked about threats or concern]; see also *United States v. Pollard*, 959 F.2d 1011 (D.C. Cir. 1992).

F. The Second, Seventh, Eighth and Eleventh Circuits do not require any special care.

Like the newly revised position of the Seventh Circuit (in the present case), the Second Circuit holds no distinction between a package plea and any other type of plea. In *United States v. Marquez*, 909 F.2d 738, 742 (2nd Cir. 1990), cert. denied, 490 U.S. 1084 (1991) the Second Circuit acknowledged generally that pleas need to be voluntary, but stated that the inclusion of a third-party benefit in a plea bargain is simply one factor for a district court to weigh in making the overall determination whether the plea is voluntarily entered. In *United States v. Gamble*, 327 F.3d 662, 664 (8th Cir. 2003), the Eighth Circuit did not require any special care where pleas are packaged. In *Stano v. Dugger*, 921 F.2d 1125, 1142 (11th Cir. 1991) the Eleventh Circuit identifies the consequences of a guilty plea, citing

Boykin v. Alabama, 395 U.S. 238, 242-43 (1969), but limits any concern about the voluntariness of package deals to actions by the state, and dismisses influence or pressure from co-defendants, friends, or family as being impairments to the voluntariness of a plea.

Prior to this present case, the Seventh Circuit had adopted the two-step safeguards like the First and Third Circuits. *United States v. Bennett*, 332 F.3d 1094, 1101 (7th Cir. 2003). However, in the present case, the Seventh Circuit below gave mere lip service to the fact that a number of other cases state that "package deals" require special scrutiny (App. 2a-3a), and the Seventh Circuit then eliminated any requirement of or even concern for a second step of requiring a more detailed Rule 11 examination when the plea agreement involves a third person to explore whether the nature of the packaged deal impairs the voluntariness of the plea. Twice in the decision below the Seventh Circuit equates a package deal to be the same as any other plea agreement. See App. 3a ("A package deal, like any other plea agreement") and App. 5a ("we have no quarrel with the requirement or with the cases that say that such deals must be viewed with caution by the judge; we add only that this is true of all plea deals").

A fair consideration of the district court's only two questions asked about the package deal in this case, as quoted above on page 8 leads to the conclusion that the district court did not "make a more detailed examination as to the voluntariness of each defendants guilty plea pursuant to the package deal," as had been at the time required by *Bennett*. This shift by the Seventh Circuit in the present case highlights the conflict among the circuits, as the Seventh Circuit swapped alignment with the First Circuit and the Third Circuit, for a new alignment with the Second, Eighth, and Eleventh Circuits. This Court should grant this petition in order to establish uniformity among the circuits in applying Rule 11 package pleas.

II. There is a conflict among the circuits regarding what factors should be considered in determining whether a defendant has shown a fair and just reason for withdrawing his guilty plea.

Five circuits have adopted their own list of factors which should be considered in determining whether a defendant has shown a fair and just reason for withdrawing his guilty plea. The Eighth Circuit has announced four factors, the First Circuit five factors, the Fourth Circuit six factors, and the Fifth and Tenth Circuits seven factors. Not only are those lists of factors in conflict, but said five circuits are necessarily in conflict with the other circuits which have not adopted a specific list of factors to be considered in determining whether a defendant has shown a fair and just reason for withdrawing his guilty plea.

The First Circuit's five factors are listed in *United States v. Martinez-Molina*, 64 F.3d 719, 732 (1st Cir. 1995) are: (1) the totality of the circumstances; (2) the plausibility of the reasons promoting the requested change of plea; (3) the timing of the defendant's motion; (4) the existence or nonexistence of an assertion of innocence; and (5) even where a defendant appears to meet the strictures of the other factors, the court still must evaluate the proposed plea withdrawal in relation to any demonstrable prejudice that will accrue to the government if the defendant is permitted to change his plea.

The Fourth Circuit's six factors are set out in *United States v. Hess*, 38 F.3d 1213 (4th Cir. 1994) which include: (1) whether the defendant has offered credible evidence that his plea was not knowing or voluntary; (2) whether the defendant has credibly asserted his legal innocence; (3) whether there has been a delay between the entering of the plea and the filing of the withdrawal motion; (4) whether the defendant had close assistance of competent counsel; (5)

whether withdrawal will cause prejudice to the government; and (6) whether it will inconvenience the court and waste judicial resources.

The Fifth Circuit's seven factors are listed in *United States v. Lampazianie*, 251 F.3d 519, 524 (5th Cir. 2001) as whether: (1) the defendant asserted his innocence; (2) withdrawal would prejudice the government; (3) the defendant delayed in filing the withdrawal motion; (4) withdrawal would inconvenience the court; (5) adequate assistance of counsel was available; (6) the plea was knowing and voluntary; and (7) withdrawal would waste judicial resources; with a determination being based on a totality of the circumstances.

In *United States v. Vest*, 125 F.3d 676, 678-79 (8th Cir. 1997) the Eighth Circuit reviewed the district court's denial of a presentence motion to withdraw a guilty plea for an abuse of discretion, except where the district court's decision hinges upon the voluntariness of the defendant's guilty plea, in which case the Eighth Circuit sees that as a mixed question of law and fact which is subject to the Eighth Circuit's independent or *de novo* review. In that context, the four factors used by the Eighth Circuit to evaluate the propriety of a district court's decision are: (1) whether defendant established a fair and just reason to withdraw his plea; (2) whether defendant asserts his legal innocence of the charge; (3) the length of time between the guilty plea and the motion to withdraw; and (4) if the defendant established a fair and just reason for withdrawal, whether the government will be prejudiced.

The Tenth Circuit's seven factors from *United States v. Carr*, 80 F.3d 413, 419 (10th Cir. 1996) are: (1) whether the defendant has asserted his innocence; (2) prejudice at the government; (3) delay in filing defendant's motion; (4) inconvenience to the court; (5) defendant's assistance of counsel; (6) whether the plea was knowing and voluntary; and (7) waste of judicial resources.

For there to be fairness in the federal criminal system there should be uniformity among all circuits in applying Rule 11(d)(2)(B). This Court should find the above conflicts to be intolerable, and pronounce what factors all federal courts should use to determine whether a defendant has shown a fair and just reason for withdrawing his guilty plea.

III. The Seventh Circuit has departed from this Court's precedents concerning Rule 11(d)(2)(B).

A. The innocence of a defendant is a fair and just reason to grant a presentence motion to withdraw guilty plea.

Legal innocence has been recognized as a fair and just reason to withdraw a guilty plea. *United States v. Carroll*, 412 F.3d 787, 792 (7th Cir. 2005); *United States v. Hodges*, 259 F.3d 655, 661 (7th Cir. 2001). But a defendant's bare protestation of innocence - especially after a knowing and voluntary guilty plea and a thorough Rule 11 colloquy - will not suffice ... the defendant must proffer some credible evidence. *Id.*

With the present case, the Seventh Circuit below has moved away from its earlier positions regarding the interpretation and application of Rule 11. The present case shows that the Seventh Circuit is also rejecting its previous directive to district courts when a defendant has provided evidence of actual innocence in support of his motion to withdraw guilty plea. Until now an accused could exercise the Rule 11's intended opportunity to present evidence of his innocence to constitute a fair and just reason to withdraw his guilty plea. The Seventh Circuit stated in *United States v. Silva*, 122 F.3d 412, 415-16 (7th Cir. 1997),

> "Of course we have never implied that a motion to withdraw guilty plea that is substantiated by evidence can be dismissed out-of-hand. In such a circumstance,

the district court, depending upon the situation presented by the particular case, must permit the withdrawal of a guilty plea, conduct an evidentiary hearing, or deny the motion with an explanation as to why the evidence is insufficient or incredible." (Emphasis added.)

However, in light of Seventh Circuit decisions which have created a *per se* rule that a Rule 11 colloquy under oath is uniformly invulnerable to subsequent challenge, district courts in the Seventh Circuit do not believe they have discretion to consider a defendant's attempted proofs of an involuntary plea or actual innocence. That is manifest in the district court's statements in its Memorandum Opinion and Order (App. 8a-12a), resulting in Spilmon's motion being summarily denied without any of the three *Silva* results.

The shifting positions of the Seventh Circuit regarding the application and interpretation of Rule 11 demonstrate the need for this Court to exercise its supervisory power with respect to presentence motions to withdraw guilty pleas.

B. By judicial fiat the Seventh Circuit has *de facto* amended Rule 11(d)(2) from "before it imposes sentence" to be as applied "before the Presentence Investigation Report is completed."

It is beyond dispute that Rule 11(d)(2)(B) relates to a motion to withdraw guilty plea before the sentence. The rule says, "Before it imposes sentence." The rules does not say, "Before the presentence investigation report is completed." The benchmark, as this Court affirmed in *United States v. Vonn*, 535 U.S. 55 (2000), within which a defendant may present a "fair and just" reason, is the period before sentencing. 535 U.S. at 73. This Court described the period before sentencing as the time, "when a mistake can be fixed." *Id.* at 73.

By judicial fiat the Seventh Circuit has amended (interpreted) Rule 11(d)(2) from "before it imposes sentence" to be instead "before the presentence investigation report is completed." This is seen in *United States v. Underwood*, 174 F.3d 850, 853 (7th Cir. 1999). Even though the court acknowledged that the rule pertained to the period prior to sentencing, the actual application by the Seventh Circuit was to discard a motion to withdraw guilty plea that was before sentencing, but after the presentence investigation report had been completed. As this Court exercises its supervisory power over the circuits, such departure from the intention of Congress and this Court should be dealt with by this Court affirming that its decision in *Vonn*, *supra*, and the specific wording of Rule 11(d)(2)(B) should be given full effect so that a motion to withdraw guilty plea filed at any time before sentencing should be considered timely and should not be summarily rejected as dilatory or late. A question is raised concerning the conflicts among the circuits regarding what factors should be considered in determining whether a defendant has shown a fair and just reason for withdrawing a guilty plea (pages 21 and 22, *supra*). Some circuits make a "delay" in filing the motion a factor, others do not, and it is unknown what is meant by "delay" and whether those criteria also are disregarding the clear language of Rule 11(d)(2)(B) that the endline is sentence.

C. By judicial fiat the Seventh Circuit has *de facto* abrogated the intention and meaning of Rule 11(d)(2)(B) by establishing a *per se* rule that the Rule 11 colloquy under oath is uniformly invulnerable to subsequent challenge regardless of the voluntariness of the plea or evidence of innocence.

United States v. Vonn, supra, is also important because this Court instructed that,

> "a reviewing court may consult the whole record when considering the effect of a Rule 11 error on substantial rights. The Advisory Committee intended the error's effect to be assessed on an existing record, but it did not mean to limit the record strictly to the plea proceeding" (as the Ninth Circuit had done).

Id. at 57 and 74.

Vonn affirms the principle that Rule 11(d)(2)(B) is intended and interpreted by this Court to be a very real, existing opportunity, prior to sentencing, while there is still time to fix a mistake, for a defendant to move to withdraw his guilty plea, and a very real right and opportunity in that case to present to the district court the facts and law to show a fair and just reason for requesting the withdrawal. The second principle from *Vonn* is that when a circuit court of appeals reviews a denial of a defendant's motion to withdraw guilty plea, it is not limited strictly to the plea proceeding, but it should determine the error's effect based upon the entire existing record, i.e. "outside the four corners of the transcript of the plea hearing and the Rule 11 colloquy, but still part of the record." *Id.* at 75.

A third principle bearing on Rule 11 procedures was pronounced by this Court in *Blackledge v. Allison*, 431 U.S. 63 (1977). *Blackledge* was a habeas corpus case, making the standard even more difficult. There this Court quoted with approval language from *Fontaine v. United States*, 411 U.S.

213, 215 (1973) and *Machibroda v. United States*, 368 U.S. 487 (1962). In those cases the interest in finality with guilty pleas was weighed against a person's freedom from detention in violation of constitutional guarantees. In these cases the defendant sought to repudiate the statements made to the court in the change of plea hearing. The statements by the defendant during the plea hearing constitute "a formidable barrier" in any subsequent collateral proceedings. Solemn declarations in open court carry a strong presumption of verity. *Blackledge*, at 74. Yet this Court declared and what *Machibroda* and *Fontaine* indisputably teach, is that the barrier of a plea or sentencing proceeding record, although imposing, "is not invariably insurmountable." *Id.* (Emphasis added.)

Quoting *Fontaine*, 411 U.S. at 215, the *Blackledge* opinion also states that, "the Court observed that no procedural device for taking of guilty pleas is so perfect in design and exercise as to warrant a *per se* rule rendering it 'uniformly invulnerable to subsequent challenge.'" *Id.* at 73.

This third principle, therefore, is that not even Rule 11's procedural safeguards immunize a guilty plea from attack or foreclose the opportunity for an evidentiary hearing on a defendant's contentions. While the objective of Rule 11 is to resolve all such issues, like any procedural mechanism, its exercise is not always perfect. Therefore, this Court has established that compliance with Rule 11 does not act as an absolute bar to subsequent collateral attack upon voluntariness of a guilty plea. *United States v. White*, 366 F.3d 291 (4th Cir. 2004) and *United States v. Marzgliano*, 588 F.2d 395, 399-400 (3rd Cir. 1978).

This Court's teaching in *Blackledge*, is that even though there is a presumption of verity and a formidable barrier attaching to the Rule 11 colloquy, a defendant's statements during the change of plea hearing are not to be considered *per se* binding. Indeed, if a defendant's statements during a Rule 11 colloquy were considered to be absolutely binding,

then ***de facto***, the intention and meaning of Rule 11(d)(2)(B) would be abrogated. This Court pronounced in *Blackledge* that the Rule 11 colloquy, by itself, does not create an inviolate bar of a withdrawal of a guilty plea regardless of voluntariness or proof of innocence.

In repudiation of *Blackledge*, the Seventh Circuit has pronounced that a defendant's sworn statements during the Rule 11 colloquy are not just presumptively valid, are not just a formidable barrier, but are binding upon the defendant in the sense of a *per se* rule rendering the statements of the defendant during the Rule 11 colloquy to be "invulnerable" to subsequent challenge and "invariably insurmountable" (terms from *Blackledge*, at 73-74). See *United States v. Stewart*, 198 F.3d 984 (7th Cir. 1999); *United States v. Trussel*, 961 F.2d 685, 689 (7th Cir. 1992).

The district court's Memorandum Opinion and Order in this case (App. 8a-12a), reveals that the district court, applying Seventh Circuit precedent, believed the Rule 11 colloquy to be all that needed to be reviewed, and that the Rule 11 colloquy by itself was binding and left the district court with no discretion whatsoever to consider any of Spilmon's affidavits or exhibits which were submitted into the record to support his motion to withdraw guilty plea and to substantiate his claim of innocence.

The Seventh Circuit's departure from this Court's precedent concerning Rule 11(d)(2)(B) could be described as a "GOTCH-YA rule" such that once a defendant completes a Rule 11 colloquy under oath, the system has "GOTCH-YA" and the defendant has no chance to present evidence to show that the plea was involuntary or that the defendant was actually innocent. In opposition to *Vonn* and *Blackledge*, the Seventh Circuit's precedents mean that the reviewing court looks only at the transcript of the Rule 11 colloquy and refuses to consider anything else outside of the Rule 11 colloquy - no matter what.

Another problem relating to the Seventh Circuit's holding that a defendant's sworn statements during the Rule 11 colloquy are binding (rather than just carrying a strong presumption of verity) is that the defendant is left with no rights or opportunities under Rule 11(d)(2)(B) to even try to demonstrate a fair and just reason for withdrawal of his guilty plea. The Seventh Circuit has *de facto* abrogated the intention and meaning of Rule 11(d)(2)(B).

Spilmon reasonably expected, based upon *United States v. Silva*, 122 F.3d 412 (7th Cir. 1997) , that when he presented to the court substantial evidence of his innocence, his motion to withdraw guilty plea would not have been denied summarily, but that he would have been either (1) permitted to the withdrawal of the guilty plea, (2) allowed an evidentiary hearing, or (3) at least given an explanation as to why the evidence is insufficient or incredible. *Id.* at 415 citing *United States v. Groll*, 992 F.2d 755, 758 (1993).)

Spilmon presented many factual affidavits, and many exhibits demonstrating the involuntariness of Spilmon's plea and Spilmon's actual innocence. The government chose not to deny any of Spilmon's evidence and chose not to submit any counter-affidavits. The Seventh Circuit's "GOTCH-YA" precedents left the district court believing that it had no discretion to permit Spilmon to withdraw his guilty plea prior to sentencing. Spilmon was deprived of his rights and opportunities under Rule 11(d)(2)(B). This Court should not tolerate the Seventh Circuit's departures from this Court's precedents.

IV. The conflicts among the circuits regarding the interpretation and application of Rule 11 in the context of a presentence motion to withdraw guilty plea calls for the exercise of this Court's supervisory power.

Criminal defendants should not face differing and conflicting standards regarding the application of the Federal Rules of Criminal Procedure. To the extent possible, criminal defendants should receive the same level of rights and protections, and be subject to the same procedures, throughout the Federal criminal system, regardless of which circuit is involved. The existing conflicts among the circuits relating to the interpretation and application of Rule 11 call for this Court to exercise its supervisory power by granting this petition to resolve the circuit conflicts and to promote uniformity of rights and procedures throughout all the circuits on these important questions.

V. This petition provides an excellent vehicle for resolving the conflicts among the circuits regarding procedures under Rule 11 in the context of a presentence motion to withdraw guilty plea.

Because of the conflicts in the circuits, coupled with the important constitutional and federal questions which need to be answered, this Court should grant this petition for a writ of certiorari. The conflicts mentioned have percolated among the several circuits, but they are not being resolved. The existing conflicts should be considered intolerable because they fundamentally affect the administration of justice. It violates basic fairness, as well as constitutional rights, for the questions presented in this petition to be answered differently by the various circuits. The Seventh Circuit has shown a flagrant disregard for this court's precedents and the results have been egregious. The standards and procedures

for presentence motions to withdraw are recurring questions that are important throughout the entire country and which need immediate resolution.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted.

PAUL D. REFIOR ("RAFE")
Counsel of Record
Refior Law Office
347 North Buffalo Street
Warsaw, Indiana 46580
TEL: 574-269-6649
FAX: 574-269-7487
EMAIL: paul@refior.com

OCTOBER 16, 2006

In the
United States Court of Appeals
For the Seventh Circuit

No. 05-3750

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

BRYAN E. SPILMON, *et al.*,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Indiana, South Bend Division.
No. 3:04-CR-70 - Allen Sharp, *Judge*.

ARGUED APRIL 12, 2006 - DECIDED JULY 19, 2006

Before POSNER, RIPPLE, and MANION, *Circuit Judges*.

POSNER, *Circuit Judge*. Bryan Spilmon, a dentist, was indicted for defrauding Medicaid by submitting claims for work that he had not performed, billing for unnecessary procedures, concealing overpayments to him by Medicaid, and committing related offenses. He agreed to plead guilty

and receive a 57-month sentence. As part of the plea agreement, the government dismissed charges against his wife. A couple of months after the district judge accepted the guilty plea in a hearing in which Spilmon admitted his guilt, Spilmon moved to withdraw his plea. The judge denied the motion without an evidentiary hearing and sentenced Spilmon to the 57-month prison term to which he had agreed in the plea agreement (plus three years of supervised release) as well as to pay restitution in excess of $2.4 million. Spilmon appeals from the judgment, arguing that the district judge should have allowed him to withdraw his guilty plea.

His main ground is that the plea was coerced: he says that he believed (in fact knew) all along that he was innocent but that his love for his wife had moved him to admit his guilt so that the charges against her would be dropped. "Package" plea agreements in which dismissal of charges against a spouse or other family member of the principal malefactor is part of the deal are common. They are not improper or forbidden. E.g. *Politte v. United States*, 852 F.2d 924, 929-30 (7th Cir. 1988); *United States v. Marquez*, 909 F.2d 738, 741-43 (2nd Cir. 1990); *United States v. Mescual-Cruz*, 387 F.3d 1, 7-8 (1st Cir. 2004); *United States v. Hodge*, 412 F.3d 479, 490-91 (3rd Cir. 2005). It would be in no one's interest if a defendant could not negotiate for leniency for another person. From the defendant's standpoint the purpose of pleading guilty is precisely to obtain a more lenient outcome than he could expect if he went to trial. It is a detail whether the leniency he seeks is purely selfish or encompasses additional persons, provided that his plea is not coerced.

A number of cases state that such "package deals" require special scrutiny "because they present unique opportunities for coerced pleas." *United States v. Bennett*, 332 F.3d 1092, 1100 (7th Cir. 2003); see also, e.g., *United States v. Mescual-Cruz, supra*, 387 F.3d at 7; *United States v. Abbott*, 241 F.3d 29, 34-37 (1st Cir. 2001); *United States v. Carr*, 80

F.3d 413, 416 (10th Cir. 1996); *United States v. Caro*, 997 F.2d 657, 659 (10th Cir. 1993). Some cases, such as *Mescual-Cruz*, rightly emphasizes the risk that the defendant may be agreeing to a package deal under threats or other improper pressure from the beneficiary of the deal. Others suggest that "a threat of long imprisonment for a loved one, particularly a spouse, would constitute even greater pressure on a defendant than a direct threat to him." *United States v. Pollard*, 959 F.2d 1011, 1021 (D.C. Cir. 1992). These cases do not, however, suggest an empirical basis for believing that the typical criminal is so altruistic that he is likely to sacrifice himself impulsively for another person. It could be argued that the decision to sacrifice oneself for another is more likely to be carefully, even agonizingly, considered than to be impulsive.

Not all cases endorse a double standard whereby package deals receive stricter scrutiny than other plea agreements. In *Johnson v. Trigg*, 28 F.3d 639, 645 (7th Cir. 1994), for example, we said that "the only arguably improper pressure that the police exerted to get Norman to confess - once the alleged promise to release his mother is set aside as having been acknowledged by Norman himself not to have been an inducement - was to arrest his mother. While her arrest may, despite what the state trial judge appears to have thought, have played a role in Norman's decision to confess, there is no basis in the record to conclude that it prevented him from making a rational decision whether to confess."

This is not to deny that a package deal, like any other plea agreement, could be coercive, in the sense of elicited by improper pressure. Suppose Spilmon were innocent, and knowing this but wanting to convict him anyway the government told him that unless he pleaded guilty it would prosecute his wife - whom it also knew to be innocent. The couple could of course reject the package deal, hoping to be acquitted (being by hypothesis innocent), but given the inherent uncertainties of the trial process they might be

afraid to do so, and the result would be a plea of guilty that resulted in the conviction of an innocent person (the husband). That would be a case of duress, see *Politte v. United States, supra*, 852 F.2d at 930 - that is, of pressure exerted to obtain a result to which the party applying the pressure had no right, e.g. *Resolution Trust Corp. v. Ruggiero*, 977 F.2d 309, 313-14 (7th Cir. 1992); *Sheehan v. Atlanta Int'l Ins. Co.*, 812 F.2d 465, 469 (9th Cir. 1987). And likewise if the government threatened to prosecute the defendant's wife knowing that she was innocent. *United States v. Wright*, 43 F.3d 491, 498-99 (10th Cir. 1994); *Martin v. Kemp*, 760 F.2d 1244, 1248-49 (11th Cir. 1985). But it is not duress to offer someone a benefit you have every right to refuse to confer, in exchange for suitable consideration. That is all that happened here. There is no suggestion that the government believed either Spilmon or his wife to be innocent or that it lacked probable cause to prosecute either of them.

Just the other day, in *United States v. Miller*, 2006 WL 1541426, at *2 (7th Cir. June 7, 2006), citing *Johnson v. Trigg*, *supra*, we explained (citations omitted) that "an objectively unwarranted threat to arrest or hold a suspect's paramour, spouse, or relative without probable cause could be the sort of overbearing conduct that society discourages by excluding the resultant statements. Miller has not given us any reason to doubt that the police accurately stated what they would do if he clammed up, and he does not deny that the Constitution would have allowed them to carry out that plan, for they had probable cause to arrest both Miller and his girlfriend."

Any prosecution of a person that the prosecutor believes to be innocent is coercive; the expected penalty is positive (the chance of conviction may be small, but it is still a chance) and may thus induce a guilty plea. It is a detail whether the prosecutor increases the expected punishment of

an innocent person by piling on the charges against him or by threatening to prosecute another innocent person.

It is a detail but not an unimportant one. The cases that express particular concern about package deals operationalize their concern by requiring that the existence of such a deal be disclosed to the judge so that he can determine its voluntariness. *United States v. Bennett, supra*, 332 F.3d at 1100-01; *United States v. Abbott, supra*, 241 F.3d at 34; *United States v. Holland*, 117 F.3d 589, 594 (D.C. Cir. 1997); cf. *United States v. Clements*, 992 F.2d 417, 419 (2nd Cir. 1993). We have no quarrel with the requirement or with the cases that shay that such deals must be viewed with caution by the judge; we add only that this is true of all plea deals. The requirement was satisfied in this case. The plea agreement stated that Spilmon's guilty plea was conditional on the dismissal of the indictment against Mrs. Spilmon. The district court confirmed the condition with both the government and Spilmon at the plea hearing - during which, moreover, the judge four times asked Spilmon whether he was pleading guilty voluntarily and each time Spilmon answered in the affirmative without hesitation. He swore that he had not been "improperly threatened or intimidated into pleading guilty."

The failure of Spilmon's duress argument dooms his other argument - that his lawyer in the district court was ineffective in not demanding access to or copies of Spilmon's billing and other records, which the government had seized for use in evidence. Spilmon argues that the records prove his innocence. But with duress as a ground for withdrawing his guilty plea eliminated, we have simply a case in which a defendant seeks to withdraw his guilty plea on the ground that he committed perjury when he told the judge under oath that he had indeed committed the criminal acts with which the government had charged him. *United States v. Schuh*, 289 F.3d 968, 975 (7th Cir. 2002); *United States v. Stewart*, 198 F.3d 984, 986-87 (7th Cir. 1999).

It would not be perjury had he believed when he pleaded guilty that he *was* guilty and only later discovered that, having misunderstood the law or the facts, he had a good defense. *United States v. Gomez-Orozco*, 188 F.3d 422, 426-27 (7th Cir. 1999); *United States v. Groll*, 992 F.2d 755, 759-60 (7th Cir. 1993). But there is no suggestion of that here. He testified under oath at his plea hearing that he was satisfied with his lawyer's representation of him. The records he says his lawyer should have made copies of or looked at more closely were his own records and he must have known at least approximately what they contained. If he thought them exculpatory - if he thought they included records of the very dental procedures that the government contended he had not performed, or described other procedures that the government was wrong to think unnecessary - he would not have testified under oath that he was guilty. A confessed perjurer, he is fortunate that the government has not agreed to his withdrawing his plea so that it can seek a heavier sentence. He has no consistent story of how after pleading guilty he suddenly discovered that his own records proved him innocent.

When he first moved to withdraw his plea, he argued only that though he had known all along that he was innocent, he had decided to fall on his sword to save his wife even though if he was innocent so was she. Later he embroidered his motion to intimate that he might have forgotten what was in the records and that they proved his innocence. He must know whether he's innocent or not, so he would need access to the records only if he thought the evidence against him so overwhelming that unless the records contained exculpatory evidence he would be certain to be convicted. He was permitted to spend five days reviewing and copying records with the aid of his lawyer, and he was offered three more days to do this and turned that offer down, demanding unlimited access. The court did not abuse its discretion in refusing that demand. It is apparent from the defendant's failure to employ the three additional days to look for

exculpatory materials that his request for unlimited access was a stalling tactic.

AFFIRMED.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	**No. 3:04cr0070 AS**
	)	
BRYAN E. SPILMON (1)	)	
ADVANCED DENTAL	)	
CONSULTING, INC. (2)	)	
INDIANA, INC. (3)	)	
DIANE SPILMON (4)	)	
BE FREE, LP (5)	)	
PEN FUN LP (6) and	)	
QUIXOTIC LP (7)	)	

MEMORANDUM OPINION AND ORDER

This court now takes full judicial notice of the entire record in this case. Necessarily the focus must be on the proceedings held in this court on February 23, 2005 in which the defendant, Bryan E. Spilmon, testified under oath. This court has had available the full transcript of that proceeding and has examined it very carefully. For immediate reference, that transcript is now incorporated herein and adopted as Appendix "A" hereto. Since that proceeding, there has been an extremely wide array of filings on behalf of the defendant Bryan E. Spilmon which have been adopted by other defendants in this case. With such an array of filings containing a wide variety of allegations of alleged misconduct and indeed alleged criminal conduct, the immediate instinct of a federal district trial judge would be to set all of these matters for hearing and wade through them

and make appropriate findings. That experienced instinct caused this court to set the matter here for June 16, 2005. After long reflection and careful consideration of the unquestioned applicable law in this circuit, this court has decided to lay aside its instincts for a massive elaborate hearing and to follow what it conceives as the clear mandates of the law in this circuit. In doing so, it was never the intent of this court to create any inconvenience to anyone involved in this case. It is simply the conclusion here that the demands of the law are clear and this court must follow them.

It is not seriously contended here that the plea proceedings involving the defendant Bryan E. Spilmon were in some way in violation of Rule 11 of the Federal Rules of Criminal Procedure. Quite to the contrary. It is more than tacitly admitted that there was indeed such compliance. The decision that tipped the scales in favor of the actions taken by this court were of a very recent origin. A recent decision of the Court of Appeals squarely applies here. In fact, the factual setting of this case is even less egregious for a possible withdrawal of plea than the one there. That recent decision of the Seventh Circuit is built on a solid foundation of case law stretching back over at least two decades. *See United States v. Cieslowski,* No. 03-2890 (7th Cir. June 1, 2005).

As a matter of fact, the plea proceedings here were under oath. In looking at an extensive list of cases in this circuit, one found in which the plea proceedings were clearly under oath was *United States v. Trussel*, 961 F.2d 685- 689 (7th Circ. 1992):

> One especially important consideration is the defendant's answers to the questions posed at his Rule 11 hearing. We accord the record created by a Rule 11 inquiry a "presumption of verity." *United States v. Ellison*, 835 F.2d 687, 693 (7th Cir. 1987). " '[R]ational conduct requires that voluntary responses made by a defendant [when entering a guilty plea] ...

be binding.' " *United States v.* McFarland, 839 F.2d at 693). A defendant who presents reason for withdrawing his plea that contradicts the answers he gave at a Rule 11 hearing faces an uphill battle in persuading the judge that his purported reason for withdrawing his plea is "fair and just." Cf. *United States v. Stitzer,* 785 F.2d 1506, 1514 & n. 4 (11th Cir. 1986) (no evidentiary hearing required on motion to withdraw plea in light of extensive Rule 11 inquiries court made before accepting plea). Since the trial judge, who is most familiar with the record and had the actual opportunity to observe the defendant during *690 the Rule 11 hearing, is in the best position to determine whether a proffered reason is, in context, "fair and just," we review the decision not to hold an evidentiary hearing deferentially. See *Suter*, 755 F.2d at 525-26 (applying clearly erroneous standard of review).

See United States v. McFarland, 839 F.2d 1239 (7th Cir. 1988), as well as *United States v. Stewart,* 198 F.3d 984, 986 (7th Cir. 1999) which states:

> Stewart had sung a different song when entering his plea, however. Under oath, he not only admitted all of the elements of the offense but also admitted owning and possessing the cocaine that his brother's affidavit later claimed that Stewart had never touched. Stewart also swore that he knew that 60 months' imprisonment was the minimum he could receive, that the maximum was 480 months, that he could not rely on receiving any particular sentence, and that no one had made any assurances concerning the sentence he would receive. If what he told the judge when entering his plea was true, then everything he told the judge when seeking to withdraw that plea was false (and the reverse). Stewart attempted to explain away his evident perjury:

> I just was swearing under oath because I already knew that the plea bargain and everything was set up. So I was just saying anything to go along with the plea because I didn't want my plea to get took back ... [T]he only reason I set there and said I was guilty and swore under oath so many times is because I already had in my mind that I had 60 months coming. No matter what you said and no matter what question you asked me, I already had it in my mind that I had 60 months coming. So I was just answering all your questions just to be answering them, whether they were truthful or not.

The district judge was no impressed by this "justification" for perjury on top of drug dealing and denied the motion to withdraw the plea. Because the judge concluded that by procuring his brother's affidavit Stewart had frivolously denied relevant conduct (that is, had denied a drug transaction to which he had already admitted under oath at the plea hearing), the judge declined to deduct three offense levels under U.S.S.G. § 3E1.1.

These cases clearly support the result reached here. So do *United States V. Messino,* 55 F.3d 1241 (7th Cir. 1995) and *United States v. Hodges,* 259 F.3d 655 (7th Cir. 2001). This court does not conceive that this record triggers proceedings under *United States V. Croll*, 992 F.2d 755 (7th Cir. 1993). These circuit authorities do not require this court to here decide whether this defendant was lying on February 23, 2005 or now or vice versa. These decisions seriously inhibit the withdrawal of a plea when the plea proceedings have been under oath. It seems that basically the same rules apply when pleas are not under oath. Under the case law in this circuit, it is extremely difficult for a defendant who enters a plea of guilty under oath which complies with Rule 11 to wiggle out of it. To put it bluntly but no disrespectfully, it is

thi8s court's firm conviction that the case law in this circuit does not require this court to wade through the elaborate allegations that this defendant has attempted to place before it. In fact, some but certainly not all of the case law authorize a summary and quick resolution of the issues to withdraw. That has certainly not been the case here. The parties and counsel have been given a full opportunity to spread of record a wide array of contentions and counter-contentions. In the last analysis, however, it all goes back to the carefully conducted plea proceedings as explicated here. In order to fill out this record, it is necessary for this court to proceed with the sentencing of the defendant Bryan E. Spilmon. At that sentencing, the court will take up the question, in fact two questions, one, whether an appeal can be taken or permitted, and secondly, whether it is appropriate to stay the execution of any sentence until any such appeal is completed. Although the decision has not been firmly made yet, this court will look favorably on both options. In the remote chance that this court is somehow in error, such would avoid him spending time in prison in the very immediate future. Basic fairness and due process even in this context would favor the exercise of that discretion. Sentencing of the defendant, Bryan Spilmon, is now set for **Friday, July 9, 2005 at 10:30 a.m. IT IS SO ORDERED.**

DATED: June 20, 2005

S/ALLEN SHARP

ALLEN SHARP, JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	**No. 3:04cr0070 AS**
	)	
BRYAN E. SPILMON (1)	)	
ADVANCED DENTAL	)	
CONSULTING, INC. (2)	)	
INDIANA, INC. (3)	)	
DIANE SPILMON (4)	)	
BE FREE, LP (5)	)	
PEN FUN LP (6) and	)	
QUIXOTIC LP (7)	)	

ORDER

Fairness demands that the defendants and counsel be made aware that it is the intention of this court to proceed with sentencing in this case on Friday, September 9, 2005 at 10:30 a.m. In the interest of the record, all pending motions of the defendants are not **DENIED** with leave to renew at an appropriate time. The sentencing procedure will therefore go forward as now scheduled. *See United States v. Lockwood,* No 04-2511 (7th Cir. July 26, 2005). **IT IS SO ORDERED.**

DATED: August 22,

s/ALLEN SHARP

ALLEN SHARP, JUDGE
UNITED STATES DISTRICT COURT

Rule 11. Pleas

(a) Entering a Plea.

(1) ***In General.*** A defendant may plead not guilty, guilty, or (with the court's consent) nolo contendere.

(2) ***Conditional Plea.*** With the consent of the court and the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal may then withdraw the plea.

(3) ***Nolo Contendere Plea.*** Before accepting a plea of nolo contendere, the court must consider the parties' views and the public interest in the effective administration of justice.

(4) ***Failure to Enter a Plea.*** If a defendant refuses to enter a plea or if a defendant organization fails to appear, the court must enter a plea of not guilty.

(b) Considering and Accepting a Guilty or Nolo Contendere Plea.

(1) ***Advising and Questioning the Defendant.*** Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:

(A) the government's right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath;

(B) the right to plead not guilty, or having already so pleaded, to persist in that plea;

(C) the right to a jury trial;

(D) the right to be represented by counsel - and if necessary have the court appoint counsel - at trial and at every other stage of the proceeding;

(E) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses;

(F) the defendant's waiver of these trial rights if the court accepts a plea of guilty or nolo contendere;

(G) the nature of each charge to which the defendant is pleading;

(H) any maximum possible penalty, including imprisonment, fine, and term of supervised release;

(I) any mandatory minimum penalty;

(J) any applicable forfeiture;

(K) the court's authority to order restitution;

(L) the court's obligation to impose a special assessment;

(M) the court's obligation to apply the Sentencing Guidelines, and the court's discretion to depart from those guidelines under some circumstances; and

(N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence.

(2) ***Ensuring That a Plea Is Voluntary.*** Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement).

(3) ***Determining the Factual Basis for a Plea.*** Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.

(c) Plea Agreement Procedure.

(1) ***In General.*** An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions. If the defendant pleads guilty or nolo contendere to either a charged offense or a lesser or related offense, the plea agreement may specify that an attorney for the government will:

(A) not bring, or will move to dismiss, other charges;

(B) recommend, or agree not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request does not bind the court); or

(C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement).

(2) ***Disclosing a Plea Agreement.*** The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera.

(3) ***Judicial Consideration of a Plea Agreement.***

(A) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report.

(B) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(B), the court must advise the defendant that that the defendant has no right to

withdraw the plea if the court does not follow the recommendation or request.

(4) ***Accepting a Plea Agreement.*** If the court accepts the plea agreement, it must inform the defendant that to the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the agreed disposition will be included in the judgment.

(5) ***Rejecting a Plea Agreement.*** If the court rejects a plea agreement containing provisions of the type specified in Rule 11(c)(1)(A) or (C), the court must do the following on the record and in open court (or, for good cause, in camera):

(A) inform the parties that the court rejects the plea agreement;

(B) advise the defendant personally that the court is not required to follow the plea agreement and give the defendant an opportunity to withdraw the plea; and

(C) advise the defendant personally that if the plea is not withdrawn, the court may dispose of the case less favorably toward the defendant than the plea agreement contemplated.

(d) Withdrawing a Guilty or Nolo Contendere Plea. A defendant may withdraw a plea of guilty or nolo contendere:

(1) before the court accepts the plea, for any reason or no reason; or

(2) after the court accepts the plea, but before it imposes sentence if:

(A) the court rejects a plea agreement under Rule 11(c)(5); or

(B) the defendant can show a fair and just reason for requesting the withdrawal.

(e) Finality of a Guilty or Nolo Contendere Plea. After the court imposes sentence, the defendant may not withdraw a plea of guilty or nolo contendere, and the plea may be set aside only on direct appeal or collateral attack.

(f) Admissibility or Inadmissibility of a Plea, Plea Discussion, and Related Statements. The admissibility or inadmissibility of a plea, a plea discussion, and any related statement is governed by Federal Rule of Evidence 410.

(g) Recording the Proceedings. The proceedings during which the defendant enters a plea must be recorded by a court reporter or by a suitable recording device. If there is a guilty plea or a nolo contendere plea, the record must include the inquiries and advice to the defendant required under Rule 11(b) and (c).

(h) Harmless Error. A variance from the requirements of this rule is harmless error if it does not affect substantial rights.